



Signed: August 31, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
NMP CONCORD II, LLC,

Case No. 10-43080 EDJ
Chapter 11

Debtor.

DECISION

A final hearing was held in the above-captioned case August 18, 2010 on the motion of Mechanics Bank ("Mechanics") for relief from the automatic stay of Bankruptcy Code § 362.¹ Robert Kaplan and Walter Gouldsbury, III, appeared for Mechanics. Raymond Willis appeared on behalf of debtor NMP Concord II, LLC ("NMP"). The court, having considered the evidence presented at the final hearing, and for the reasons hereinafter discussed, will grant Mechanics's motion and lift the automatic stay.

¹ All further section references herein are to the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

Decision

1 I. Background

2 NMP filed its petition under chapter 11 of the Bankruptcy Code
3 on January 14, 2010 in the Western District of Washington. The case
4 was subsequently transferred to this court by order of the Honorable
5 Karen Overstreet. Doc. 1. In its voluntary petition, NMP
6 identifies the nature of its business as single asset real estate.²
7 Doc. 2. According to its Schedule A, the debtor's primary asset is
8 a 1.60 acre unimproved lot, located at 1990 Monument Boulevard and
9 1075-1085 Oak Grove Road, in Concord, California (the "Concord
10 Property"). Id.

11 NMP entered into a lease agreement on May 4, 2006 with Thrifty
12 Payless, Inc. (the "Rite Aid Lease") by which NMP agreed to improve
13 the Concord Property by constructing a building to be used by the
14 lessee as a Rite Aid drug store. Ex. L. Pursuant to an Amended and
15 Restated Lease, NMP was to deliver the Concord Property, with
16 improvements, no later than December 14, 2009. Ex. O. The Rite Aid
17 Lease had expired by its own terms and was no longer in effect as of
18 the petition date herein.³

19 NMP and Mechanics executed a promissory note on April 25, 2007
20

21 ² Section 101(51B) defines "single asset real estate" as
22 "real property constituting a single property or project ...
23 which generates substantially all of the gross income of a debtor
...."

24 ³ Brent Nicholson, managing member of NMP, testified that
25 Rite Aid extended the lease and delivery date to March 30, 2010,
26 but did not produce documentary evidence of the extended delivery
timeline. In any event, this extended deadline has also past.

1 in the principal amount of \$7,300,000 to finance improvement of the
2 Concord Property. Ex. A. The note was accompanied by a
3 Construction Deed of Trust and Commercial Security Agreement
4 granting Mechanics a first priority deed of trust in the Concord
5 Property. Exs. B, C. The note matured on February 10, 2009. Ex.
6 E. The last payment made by NMP on the loan was on June 2, 2009.
7 Ex. I. Mechanics subsequently recorded its Notice of Default and
8 Notice of Trustee's Sale. Exs. F, G. The balance owing on the note
9 as of August 3, 2010, was \$2,737,562.70. Ex. H. Interest is
10 accruing on the balance at a rate of \$656.12 per day. Id.

11 II. Discussion

12 Bankruptcy Code § 362(a) provides that filing a petition in
13 bankruptcy operates as a stay of certain actions, including an act
14 against property that secures an obligation owed by the debtor. By
15 its motion, Mechanics seeks relief from the automatic stay in order
16 to proceed with its sale of the Concord Property. Section 362(d)
17 authorizes the bankruptcy court to grant such relief under three
18 circumstances relevant here: where the debtor has no equity in the
19 property and it is not necessary to an effective reorganization;
20 cause, including lack of adequate protection; and, in the context of
21 a single asset real estate case, where the debtor has not filed a
22 confirmable plan or commenced monthly payments within ninety days of
23 filing the petition.

24 1. § 362(d)(2).

25 Bankruptcy Code § 362(d)(2) provides that the court shall grant
26 relief from the automatic stay with respect to a stay of an act

1 against property if the debtor does not have equity in the property
2 and the property is not necessary to an effective reorganization.

3 A. Equity

4 The Ninth Circuit Court of Appeals has held that the proper
5 definition of "equity" for purposes of § 362(d)(2)(A) is the
6 difference between the value of the property and all the
7 encumbrances upon it. Stewart v. Gurley, 745 F.2d 1194, 1196 (9th
8 Cir. 1984). Pursuant to § 362(g), Mechanics has the burden of proof
9 on the issue of the debtor's equity in the property and NMP has the
10 burden on all other issues. Mechanics presented a written appraisal
11 report and testimony from general real estate appraiser Colin
12 Morrison ("Morrison") in support of its position that the debtor has
13 no equity in the Concord Property. See Ex. K. Morrison testified
14 that the highest and best use of the Concord Property was commercial
15 development. His appraisal report concludes that the "as is" value
16 of the Concord Property was \$22 per square foot, or \$1,530,000, on
17 January 12, 2010. Id. Morrison testified that he utilized the
18 "sales comparison" method of appraising the Concord Property,
19 whereby he relied on data from sales of similar real properties in
20 order to determine the likely sale price for the Concord Property.
21 Morrison testified that this method was best suited to valuing the
22 Concord Property, compared with other generally accepted appraisal
23 methodologies.⁴ Morrison relied on six comparable land sales with

24
25 ⁴ Morrison's report identifies two other methodologies, the
26 income capitalization approach, in which the income generated by
(continued...)

1 prices per square foot ranging from \$15 to \$25 to arrive at his
2 appraised value for the Concord Property. Id.

3 NMP presented testimony from commercial mortgage broker Andrew
4 Schwisow ("Schwisow") in support of its position that NMP has equity
5 in the Concord Property. Schwisow did not provide a written report,
6 but testified that in his opinion the "as is" value of the Concord
7 Property was \$45 per square foot, or \$3,137,220. Schwisow's opinion
8 is based on the income-earning potential of the Concord Property
9 taking into account its corner location, the fact that the Concord
10 Property is entitled to be developed as a drug store, and the
11 premium associated with undeveloped land located in a densely
12 developed metropolitan area like Concord. Schwisow criticized
13 Morrison's use of comparable land sales that did not reflect the
14 enhanced value of undeveloped property located in a densely
15 developed area, and the corner lot location. Schwisow testified
16 that he was able to find real properties listed for \$47 to \$67 per
17 square foot, and concluded that those prices more accurately
18 reflected the value of the Concord Property.

19 On cross-examination, Schwisow testified that his methodology
20 for determining the value of the Concord Property utilized a
21 combination of his opinion of the income potential of the property,
22 his past experience brokering real estate transactions, and
23

24 ⁴(...continued)
25 real property is used to calculate its present value, and the
26 cost approach, in which the cost of developing a unique project
for which there are very few comparable properties is analyzed.

1 comparable sales listings. Schwisow testified that his method is
2 not a generally accepted appraisal method.

3 The court is persuaded by the Morrison appraisal. The court
4 concludes that the sales comparison method, as presented by Morrison
5 through testimony and written appraisal, is the superior method for
6 valuing the Concord Property. By contrast, the Schwisow valuation
7 of the Concord Property is based upon unconventional methodology,
8 utilizes sales listings rather than consummated sales, and relies on
9 a future income producing potential of the Concord Property that is
10 speculative at best. The court therefore finds the current value of
11 the Concord Property is less than the approximately \$2.7 million
12 owed by NMP on the Mechanics loan. Mechanics has accordingly met
13 its burden of proving that NMP does not have any equity in the
14 Concord Property.

15 B. Necessary to an effective reorganization.

16 The burden now shifts to NMP to demonstrate that the Concord
17 Property is necessary to its effective reorganization. The United
18 States Supreme Court has defined "necessary" as used by § 362(d)(2)
19 as requiring the debtor to demonstrate, "a reasonable possibility of
20 a successful reorganization within a reasonable time." United
21 Savings Association of Texas v. Timbers of Inwood Forest Associates,
22 LTD., 484 U.S. 365, 376 (1988).

23 The chapter 11 plan contemplated by NMP calls for repayment of
24 the Mechanics loan in full on June 2, 2011, some ten months in the
25 future. Brent Nicholson ("Nicholson"), the debtor's managing
26 member, testified that he was in negotiations with a capital group

1 to obtain funding sufficient to pay the entirety of its debt to
2 Mechanics, as well as finance development of the Concord Property.
3 Nicholson further testified that he is in negotiations with Thrifty
4 Payless, Inc. regarding renewal of the expired Rite Aid Lease in
5 conjunction with Nicholson's development of eleven other Rite Aid
6 drug store sites. Neither set of negotiations have been reduced to
7 writing.

8 Under cross-examination, Nicholson testified that since the
9 fall of 2008 he has sent out between two and three hundred
10 informational packets to potential lenders regarding the Concord
11 Property, but these efforts did not generate additional financing.
12 Nicholson also testified that he approached three major banks in the
13 winter of 2009 regarding a refinance loan on the Concord Property,
14 but was not able to obtain such financing.

15 "While it is true that a relief from the stay hearing should
16 not be converted into a confirmation hearing, the 'effective
17 reorganization' requirement enunciated by the Supreme Court requires
18 a showing by a debtor that a proposed or contemplated plan is not
19 patently unconfirmable and has a realistic chance of being
20 confirmed. Courts usually require the debtor to do more than
21 manifest unsubstantiated hopes for a successful reorganization." In
22 re Sun Valley Newspapers, Inc., 171 B.R. 71, 75 (9th Cir. BAP 1994)
23 (internal citations omitted). Nicholson has certainly made a
24 diligent effort to secure financing to enable NMP to develop the
25 Concord Property site. It is unfortunate that these efforts,
26 however determined, have not produced tangible results. In this

1 case, the court must conclude that the NMP plan of reorganization is
2 speculative, and not capable of producing a successful
3 reorganization within a reasonable time. The Concord Property is
4 therefore not necessary to an effective reorganization, within the
5 meaning of Timbers.

6 The court holds that Mechanics is entitled to relief from the
7 automatic stay under § 362(d)(2) because NMP does have any equity in
8 the Concord Property, and it is not necessary to an effective
9 reorganization.

10 2. § 362(d)(1).

11 Bankruptcy Code § 362(d)(1) provides that the court shall grant
12 relief from the automatic stay with respect to a stay of an act
13 against property "for cause, including ... lack of adequate
14 protection." Section 361 provides three non-exhaustive examples of
15 adequate protection where the automatic stay results in a decrease
16 in the value of an entity's interest in property: periodic cash
17 payments, a replacement lien, or other relief that grants the entity
18 the "indubitable equivalent" of the entity's interest in such
19 property.

20 "Although the existence of an equity cushion as a method of
21 adequate protection is not specifically mentioned in § 361, it is
22 the classic form of protection for a secured debt justifying the
23 restraint of lien enforcement by a bankruptcy court. In fact, it
24 has been held that the existence of an equity cushion, standing
25 alone, can provide adequate protection." In re Mellor, 734 F.2d
26 1396, 1400 (9th Cir. 1984) (internal citation omitted). In this

1 case, however, the court has concluded that NMP does not have any
2 equity in the Concord Property with which to protect Mechanics's
3 position. It further appears that Contra Costa County has a claim
4 for property taxes owed on the Concord Property that are accruing in
5 advance of Mechanics's claim. See Debtor's Schedule E, Doc. 2. The
6 automatic stay is therefore decreasing in the value of Mechanics's
7 interest in the Concord Property.

8 There is no equity cushion. NMP has not made any payment on
9 the Mechanics loan since June of 2009, nor are any payments to
10 Mechanics contemplated by the NMP chapter 11 plan until June of
11 2011. No evidence has been presented as to NMP's ability to offer
12 Mechanics any replacement lien. In short, NMP has not adequately
13 protected, and has presented no persuasive evidence that it can
14 adequately protect, Mechanics's interest in the Concord Property.

15 The court holds that Mechanics is entitled to relief from the
16 automatic stay for cause under § 362(d)(1) because Mechanics's
17 interest in the Concord Property is not adequately protected.

18 3. § 362(d)(3).

19 Bankruptcy Code § 362(d)(3) provides that the court shall grant
20 relief from the automatic stay with respect to a stay of an act
21 against single asset real estate unless, within ninety days of the
22 filing of the petition in bankruptcy, the debtor files a plan that
23 has a reasonable possibility of being confirmed within a reasonable
24 time, or commences monthly payments under the contract rate.

25 NMP is a single asset real estate debtor within the meaning of
26 § 101(51B) because the Concord Property is its sole potential source

1 of gross income. As previously discussed, NMP is not making
2 payments on its obligation to Mechanics, contractual or otherwise.
3 NMP did file a plan of reorganization within ninety days of the
4 petition herein, however, the court holds that this plan does not
5 have a reasonable possibility of being confirmed within a reasonable
6 time. This is because it impermissibly places all risk of loss on
7 Mechanics by forcing Mechanics to wait until June 2011 to be paid on
8 its loan or to delay foreclosure until that date in the event NMP is
9 ultimately unable to procure financing with which to repay
10 Mechanics. The June 2011 payment date contemplated by the NMP plan
11 is particularly burdensome to Mechanics in light of the February
12 2009 loan maturity date for which it originally bargained.

13 The court holds that Mechanics is entitled to relief from the
14 automatic stay under § 362(d)(3) because NMP is a single asset real
15 estate debtor that is not paying Mechanics at the contract rate, and
16 has not proposed a plan of reorganization that has a reasonable
17 possibility of being confirmed within a reasonable time.

18 III. Conclusion

19 For the foregoing reasons, the court holds that Mechanics is
20 entitled to relief from the automatic stay under Bankruptcy Code
21 §§ 362(d)(2), (d)(1), and (d)(3). The court requests counsel for
22 Mechanics to submit a proposed order lifting the automatic stay.

23 **END OF DECISION**
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Decision

11